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KINDEL & ANDERSON
ATTORNEYS AT LAW
SUITE 1020 SECURITY BUILDING
810 SOUTH SPRING STREET
LOS ANGELES, CALIFORNIA 90013
MADISON 6-8551

Attorneys for Certain Defendants

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DEC ... 1965
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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

In the Matter of the Estate of

MARCELLUS L. JOSLYN,
aka M. L. JOSLYN and
MARCELLUS LINDSEY JOSLYN,

Deceased.

No. P-471,032

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER DISMISSING AMENDED WILL CONTEST AFTER PROBATE

MARCELLUS N. JOSLYN,

Contestant,

vs.

ROBERT D. MacDONALD, et al.,

Defendants.

The Motion for Order Dismissing Will Contest and for Other Appropriate Relief made by certain Defendants pursuant to Code of Civil Procedure Section 2034 came on regularly for hearing at 1:30 p.m., on the 5th day of October, 1965, in Department 4 of the above-entitled Court, before the Honorable Donald R. Wright, Judge Presiding. Contestant, Marcellus N. Joslyn, appeared by his attorney, Phill Silver, and certain Defendants appeared by Kindel & Anderson and Ernest J. Zack, Malcolm George Smith and Russell W. Bogda, their attorneys.

The Court, after considering such Motion, the supporting declarations and points and authorities filed by the moving

Defendants, the declaration and points and authorities filed by Contestant, and the other pleadings and papers in the file, and the cause having been fully argued and submitted to the Court for decision;

NOW, THEREFORE, the Court being duly advised on the premises, does hereby find that proper notice of the hearing on the Motion to dismiss was duly given, and does hereby make its findings of fact, conclusions of law, and order herein as follows:

FINDINGS OF FACT

Nature and Status of Amended Will Contest After Probate at Time of Hearing of Motion to Dismiss

1. A document dated June 29, 1962, entitled Last Will and Testament of Marcellus L. Joslyn (hereafter referred to as Decedent), was filed with the Los Angeles County Superior Court for admission to probate on July 10, 1963.

2. Prior to the admission to probate of such document, Marcellus N. Joslyn, son of Decedent, and his then attorney, Harry Mabry, filed a Contest before Probate, the grounds of which were based solely on allegations made upon information and belief.

Named as Defendants in such Contest were the following: Decedent's other three children, namely George R. Joslyn, Merritt L. Joslyn and Mary C. Parker; Decedent's fifteen grandchildren, namely Marcellus LeFevre Joslyn, Roland Merritt Joslyn, Ilse Audrey Poleri, Marcia Harriet Joslyn, Marina Elaine Joslyn, Joy Louise MacNulty, Mary Alice Gurley, Jolyon David Joslyn, Theodore Newell Joslyn, Alice Joslyn, William Dwight Joslyn, Penny Irene Joslyn, Celia Alice Parker, M. Wesley Parker III, Marcellus Joslyn Parker; the named Executor, Robert D. MacDonald; and Mary R. Shoff Carey, Lois E. Mendenhall and Robert F. Dolan.

3. In connection with the defense of that Contest, the deposition of Marcellus N. Joslyn (hereafter referred to as Contestant) was taken commencing December 12, 1963, and adjourned

sine die on December 18, 1963.

At the time of the taking of that deposition it appeared that Contestant did not have substantial evidence to support most of the grounds of Contest.

Examples of such lack of evidence follow:

He alleged that Decedent at the time of subscribing or acknowledging the instrument did not declare to the attesting witnesses that it was his Will; when questioned concerning this allegation he said he had no evidence to support it. He alleged that Decedent had been the subject of undue influence by MacDonald, Mendenhall and Carey at the time he executed the document, but when questioned concerning this allegation he said he had no evidence to support it. Contestant further admitted he had no evidence of anything having to do with the procurement of the document by MacDonald, Mendenhall and Carey. He alleged that MacDonald, Mendenhall and Carey were guilty of oppression, fraud and malice in efforts to cheat him out of his inheritance; when questioned as to this allegation he admitted he had no evidence to support it. He alleged that the Will was obtained through fraudulent representations made by Defendants MacDonald, Mendenhall and Carey to the Decedent; when questioned as to this allegation he admitted he had no evidence to support it.

4. Such Contest was set for trial on March 31, 1964, but was voluntarily dismissed by Contestant on March 26, and the document was admitted to probate on April 29, 1964.

The above findings of fact are relevant in determining the extent of the Defendants' discovery during the Contest before Probate, and the propriety of further discovery by Defendants in defense of the Contest after Probate, as hereinafter found. The Order entered on the findings of fact and conclusions of law which follow is in no way based upon the facts that the grounds of Contest before Probate were alleged upon information and belief; that

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Contestant, at the time of the above deposition, appeared to have no support for some of such grounds; or that he voluntarily dismissed such Contest.

5. On October 27, 1964, Contestant, in pro per, filed a Contest after Probate, the grounds of which were virtually identical to those of his Contest before Probate, and the allegations of which were again made upon information and belief.

After demurrer sustained, Contestant and his then counsel, John S. Hunt, on January 4, 1965 (except as otherwise herein stated, all dates which follow are in 1965), filed an Amended Contest after Probate, the grounds of which were substantially the same as those of the preceding Contests and the allegations of which were again made upon information and belief.

6. On or about March 25, a Memorandum for Setting Contested Action was filed and served by Defendants. Hearing thereon was had on April 5, at which time this Court (Department One) reserved a trial date of October 6, such date to be set during July upon further application to the Court.

7. On July 22 this Court (Department One) set the Contest for trial on October 6. Notice of the July 22 hearing was mailed on July 16 to John S. Hunt, Contestant's attorney of record, and to Phill Silver. Notice of the October 6 trial date, as confirmed by such Court on July 22, was served by Defendants on both such attorneys and on Contestant on July 22.

8. A Motion by Contestant for continuance of that trial date was heard and (except for a continuance from October 6 to October 8) denied by this Court (Department One) on September 24. A further Motion by Contestant to vacate the trial date was heard and denied on October 1.

9. On September 20 Defendants filed and served the within Motion for an Order dismissing the Amended Contest after Probate pursuant to Code of Civil Procedure Section 2034.

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Events Relating to Obligation of Third-Party Witnesses to Submit to Discovery

10. Lillian Johnson, a nonparty witness, had executed two declarations concerning the testamentary capacity, undue influence, and health, mental and physical, of Decedent at times relevant to the execution of the Will which were filed on behalf of Contestant. On January 8 a notice for her deposition was served and filed and a Subpoena re Deposition was issued. Repeated attempts to serve Lillian Johnson with the Subpoena at the address she gave in her declarations and the attempts of a private investigator employed by Defendants to locate Lillian Johnson were unsuccessful. At the deposition of her son, John K. Johnson, on February 16, he refused, when asked, to give the whereabouts of his mother. Defendants have been unable, despite the exercise of due diligence, to make service of an Order of this Court made on April 5 requiring the son to furnish the address of Lillian Johnson and to give any other information that he might have concerning her whereabouts.

11. Rea Hildebrant and her husband, David Hildebrant, nonparty witnesses, executed a joint declaration concerning the testamentary capacity, undue influence, and the health, mental and physical, of the testator at times relevant to the Contest, which was filed on behalf of Contestant in this action. Rea Hildebrant also individually executed a declaration concerning the testamentary capacity, undue influence, and the health, mental and physical of the Decedent at times relevant to the Contest, which was filed on behalf of Contestant in this action.

On or about January 8 a notice for her deposition was served and filed, and a Subpoena re Deposition was issued. Defendants were unable to serve such Subpoena and the deposition was not taken. On or about April 22 a notice for her deposition was served and filed and Subpoena re Deposition was issued and served on her. On the date noticed for her deposition, May 15, she

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did not appear. Although an Order to Show Cause re Contempt was issued by this Court, Defendants have, despite the exercise of due diligence, been unsuccessful in serving it.

David Hildebrant also individually executed a declaration concerning the testamentary capacity, undue influence, and the health, mental and physical, of the Decedent at times relevant to the Contest, which was filed on behalf of Contestant in this action. Defendants, despite the exercise of due diligence, have never been able to serve him with a Subpoena re Deposition.

12. A notice was filed and served, and Subpoena issued, for the deposition of Florence McElwain, a nonparty witness mentioned by Contestant in his December, 1963, deposition as a witness having knowledge concerning the physical condition of the testator at times relevant to the Contest, which deposition was set for September 8. Although properly served, she did not appear on the date of her deposition. On such date Defendants received through the mail a letter from Florence McElwain stating that she would not appear for her deposition and that she had not been properly served. Although an Order to Show Cause in re Contempt was issued by this Court, Defendants were, despite the exercise of due diligence, unsuccessful in serving it prior to the filing of Defendants' Motion for dismissal.

13. Notices were filed and served, and Subpoenas issued and properly served for the depositions of Mr. and Mrs. Ed Wratten, nonparty witnesses mentioned by Contestant in his December, 1963, deposition as witnesses having knowledge of the testamentary capacity, undue influence, and the health, mental and physical, of the testator at times relevant to the Contest, which depositions were set for September 9. On September 8 Defendants received a letter from these witnesses stating that they would not appear for the depositions because they needed time to obtain counsel. Contestant's attorney, by letter dated September 8, advised the

Wrattens they were not required to attend the depositions on September 9 because they were set on a legal holiday. Such act of Contestant's counsel was an intentional attempt to, and did impede and prevent Defendants from obtaining the depositions of the Wrattens. They did not appear on the noticed date, and, despite the exercise of due diligence, Defendants have been unable to serve the Wrattens with an Order to Show Cause re Contempt issued by this Court.

14. Notices were filed and served and Subpoenas issued and properly served for the depositions of Mr. and Mrs. Leon Butterfield, nonparty witnesses mentioned by Contestant in his December, 1963, deposition as having knowledge of the mental and physical condition of the Decedent at times relevant to the Contest, which depositions were set for 10:00 a.m., Saturday, September 18, at Lakeport, California. Prior to such time Defendants received a written statement of a physician stating that the Butterfields were physically unable to appear in Court. On inquiry of the physician it was determined that they were able to appear for depositions, and the Butterfields were then notified by Defendants that the depositions would proceed as scheduled. At approximately 3:30 p.m. on September 17, Defendants received a letter dated September 16 from Contestant's attorney which advised the Butterfields that they were not required to attend the depositions because they were set for a Saturday, and that a notice setting a deposition on a Saturday was void. Although counsel for Defendants and a reporter appeared at the noticed time and place, the Butterfields did not appear. Counsel for Defendants thereupon proceeded to their home. Contestant and his wife were found there, and they refused to allow the depositions of the Butterfields to proceed. The presence of Contestant at the Butterfield's house and his refusal to allow their depositions to proceed and the act of Contestant's counsel in writing the letter of September 16 to the Butterfields were intentional attempts to, and did impede and

prevent Defendants from obtaining the depositions of the Butterfields.

15. The activities of Contestant and his counsel in connection with the Wrattens and Butterfields were a part of a scheme or plan which was preconceived by Contestant and actively pursued by him and his counsel with the intent of preventing Defendants from obtaining discovery from such witnesses prior to the October trial date and were a part of a scheme or plan which was also preconceived by Contestant and actively pursued by him and his counsel with the intent of preventing Defendants from obtaining any discovery prior to such trial date or forcing Defendants to go to trial without the discovery sought by them. The activities of Contestant and his counsel with the nonparty witnesses indicate willfulness on the part of Contestant in his personal refusal to submit to discovery, as hereinafter found.

Events Relating to the Obligation of Contestant to Submit to Discovery

16. Contestant has represented to the Court, and it is hereby found, that his address for purposes of service of notices and papers herein is General Delivery, Pasadena, California.

17. On August 10 notice of taking the deposition of Contestant on August 20 was filed and served by Defendants upon both Contestant and his attorney, Phill Silver. No other depositions of Contestant other than that of December, 1963, had been taken with reference to either his Contest before Probate or his Contest after Probate.

18. On August 12 interrogatories were served and filed on August 13 by Defendants as to Contestant's then knowledge of the whereabouts of Lillian Johnson and the Hildebrants.

19. On August 18 notice was filed and served of a hearing on August 23 of Defendants' Motion to compel Contestant to produce certain documents.

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20. On August 19 a Stipulation was signed and filed on August 23 at the request of Contestant's counsel, providing that Contestant's deposition be continued from August 20 to September 1 at 2:00 p.m. The Stipulation was made by Defendants' counsel on the representation of Contestant's counsel that the latter would be engaged in trial on August 20.

21. On August 19 notice of taking the deposition of Contestant on September 1 was again served on both Contestant and his attorney. Contestant was also served, prior to September 1, with a Subpoena to appear at the deposition on that date.

22. On August 23 Contestant appeared by counsel and requested that the hearing on Defendants' Motion to Produce Documents be continued to September 13. The declaration filed by Contestant's counsel on August 23 in opposition to the Defendants' Motion for Inspection of Documents did not raise the lack of sufficient notice of the Defendants' Motion. Even if it had been raised, lack of proper notice was waived by Contestant then requesting and obtaining a continuance of the hearing on the Motion to September 13. Such declaration of August 23 stated that Contestant's counsel had an oral argument before the Supreme Court of California on August 30, and that he would not be available until August 31 for proceedings in the Will Contest.

On August 26 Contestant's attorney filed a further declaration stating he would be available in the Will Contest on August 31.

23. On August 25 and 27 Motions were filed by Contestant for Protective Orders concerning Contestant's September 1 deposition and Defendants' interrogatories. Although he had previously stipulated to the taking of that deposition on September 1, and although the answers to the interrogatories were due not later than August 27, these Motions were set for hearing by Contestant on September 13. Despite setting such Motions for a date after

the deposition date and the due date of the answers to the interrogatories, Contestant did not ever file or obtain an order from this Court staying either the taking of the deposition or the filing and serving of answers to the interrogatories. Contestant did not serve or file a motion for a protective order against production of documents.

Contestant filed but one declaration in support of these motions for protective orders. The ground of both motions was that Defendants, in obtaining a trial setting on July 22, had filed a Certificate of Readiness, and, as a result, were barred from pursuing further discovery thereafter. The Certificate filed deleted the reference to pretrial and the statement that all deposition and discovery proceedings had been completed. Defendants have not and did not waive any discovery, nor represented to the Court at any time that no discovery would be pursued, nor was there any understanding or stipulation between Defendants and Contestant that Defendants would not seek discovery.

24. On August 25 Defendants filed and served Notice of Motion, set for hearing on August 27, for an Order resetting the hearing on Defendants' Motion to Produce Documents for September 3, for an Order confirming the September 1 deposition date and for an Order fixing August 31 as the last day upon which Contestant could file and have heard a Motion raising the issue of whether Defendants were entitled to discovery.

25. Not later than August 27 answers by Contestant to the previously submitted interrogatories were due. They were not filed or served on Defendants' counsel by such time. At no time on or prior to August 27 did Contestant request or receive, either from the Court or from Defendants' counsel, an extension of time within which to file and serve such answers. There was no stay or protective order of this Court instructing Contestant that he need not answer the interrogatories either prior to the date the answers

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ATTORNEYS AT LAW
9401 WILSHIRE BOULEVARD
BEVERLY HILLS, CALIFORNIA

were due, or at any other time. Contestant did serve and file answers to the interrogatories on September 24. They had, however, been executed by Contestant on August 24, and were not filed and served until after Defendants had filed the Motion to dismiss. Contestant intentionally withheld the answers to interrogatories until well after their due date in an attempt to impede Defendants' discovery and preparation for trial. Such answers did not respond to the interrogatories in that they did not give Contestant's knowledge as of the date submitted. Contestant intentionally avoided answering the interrogatories on the date filed and served in order to impede Defendants' discovery and preparation for trial. The failure timely to file responsive answers was willful and was a part of the scheme or plan which was preconceived by Contestant and actively pursued by him with the intent of preventing Defendants from obtaining any discovery prior to trial or forcing Defendants to go to trial without discovery.

26. On August 27, at a hearing at which Contestant's counsel was present and over his objection, this Court ruled that Defendants' Motion to Produce Documents be heard Friday, September 3, at 1:30 p.m., that the date for the taking of Contestant's deposition be confirmed for September 1 at 2:00 p.m., and that the hearing on Contestant's Motions for Protective Orders be advanced from September 13 to August 31 (i.e., prior to the noticed depositions of the Wrattens, McElwain and Contestant). On August 30 this ruling was incorporated in an Order signed, filed and served by messenger on Contestant's attorney's office.

27. On August 31 Defendants received Notice of Appeal by Contestant from the Order of August 30. Such Notice of Appeal was signed by Contestant's counsel under date of August 30, was filed on August 30, and was served by mail on August 30 from Hollywood, California, where Contestant's attorney has his office.

28. On August 31 at 2:00 p.m., pursuant to the Order of

August 30, the Court considered and denied Contestant's Motions for Protective Orders. Although neither Contestant nor his attorney appeared at the hearing, Contestant and his counsel had full and fair opportunity to be heard at such hearing. The date thereof was a subject of the Motion granted on August 27, at the hearing of which Contestant's counsel was present. The file of the action does not show that a request was made by either of such persons directly to the Court, or to Defendants' counsel, for a continuance of the hearing. Contestant's attorney had no conflicting Court appearances which would have prevented him from appearing at this hearing, and in view of the fact that there was good reason to have the matter decided before the depositions noticed by Defendants for September 1 and thereafter, no substantial excuse for Contestant's counsel's nonappearance has been made.

On September 1 this ruling on August 31 was incorporated in an Order signed, filed and served by messenger on Contestant's attorney's office.

29. On September 1 the deposition of Contestant was convened at 2:00 p.m. The file does not reflect that written objections by Contestant to any alleged errors or irregularities in the notices of depositions of August 10 and August 19 were ever served on Defendants. At no time prior to September 1 did Contestant or his counsel ask Defendants' counsel or the Court for relief from the Stipulation of August 19. On September 1 there was no Order of the Court, either staying the deposition, or granting a Protective Order, or in any other way preventing such deposition from proceeding as noticed, ordered and stipulated. Proper notice thereof had been duly given, and such deposition was also convened on that day pursuant to Subpoena timely served on Contestant and pursuant to the Order of September 1 of this Court which had been timely served. If there is any question whether Contestant had proper notice, or had not been the subject of an

Order under Code of Civil Procedure Section 2019(b)(2), such objections were waived by his Stipulation, by the physical presence of Contestant and his counsel at the proceeding without raising such objections, by his failure to serve written objections under Code of Civil Procedure Section 2021, and by his filing of a Motion for a Protective Order against the taking of the deposition on other grounds.

On September 1 Contestant and his counsel were present but Contestant refused to answer any questions as to the merits of the case at such time.

Contestant's counsel refused to permit the taking of the deposition on the following grounds: (1) that he was going to file a Petition for Writ of Mandate with the District Court of Appeal that afternoon, (2) that he had set for hearing on September 13 a Motion to Vacate the Order of August 30, and (3) that the taking of the deposition constituted harassment under Code of Civil Procedure Section 2019(d).

As to ground (1), such Petition for Writ was not filed until September 3. No stay order pending decision on the Petition for a Writ was issued by this Court or an appellate court prior to the deposition or at any time. Contestant and his counsel, in urging that the filing of a Petition for Extraordinary Writ (which was not on file at the time of the deposition) invalidated the deposition despite the fact a stay order pending decision thereon had not been obtained, had knowledge that such facts did not prevent the taking of the deposition. Contestant and his counsel intentionally adopted such ground in order to prevent the deposition from commencing and proceeding and filed such Petition in an effort to hinder and delay Defendants' efforts at discovery. Such Petition was denied by the District Court of Appeal on September 10.

As to ground (2), although the Motion to Vacate was filed September 1, no order staying the deposition pending the

decision on the Motion to Vacate was ever issued by this Court. Contestant and his counsel, in urging the pendency of a hearing on a Motion to Vacate invalidated the deposition despite the fact a stay order pending decision thereon had not been obtained, had knowledge that such facts did not prevent the taking of the deposition. Contestant and his counsel adopted such ground in order to prevent the deposition from commencing and proceeding and filed such Motion to Vacate in an effort to hinder and delay Defendants' efforts at discovery. When the Motion to Vacate was heard on September 13, neither Contestant nor his counsel appeared, and it was denied. The failure of Contestant and his counsel to appear at such time shows that in adopting the hearing of such Motion as a ground of invalidating the deposition, Contestant and his counsel had knowledge that it was an invalid ground therefor and that it was filed solely to prevent the deposition from commencing.

As to ground (3), the deposition had been expressly restricted to facts obtained by Contestant since his December, 1963, deposition. The asked questions directed to such facts were not repetitious, harassing, annoying or oppressive. In refusing to answer such questions on such grounds, Contestant did not specify wherein any of such grounds occurred as to such questions. In instructing Contestant not to answer such questions because of such grounds, Contestant's counsel did not specify wherein any of the grounds occurred as to such questions and admitted that he had not read the December, 1963, deposition to determine whether such questions would result in repetition, harassment, annoyance or oppression. In urging such grounds, demanding that the deposition be suspended, and suspending it pursuant to Code of Civil Procedure Section 2019(d), Contestant and his counsel prevented the deposition from proceeding. Such demand and suspension occurred only after Contestant's counsel had refused to allow the deposition to be taken based upon the other grounds above. Despite the suspension

under Section 2019(d), no motion for an order under that section was ever made by Contestant or his counsel. Such failure to make such motion shows that such grounds were urged solely to prevent the deposition from commencing.

The refusal of Contestant to answer any questions at the deposition was discussed by Contestant with his counsel during a recess and Contestant persisted in his refusal to answer such questions after such recess. Contestant refused to answer questions at the deposition and the acts of him and his counsel in connection therewith were a part of the scheme or plan which was preconceived by Contestant and actively pursued by him with the intent of preventing Defendants from obtaining any discovery prior to trial or forcing Defendants to go to trial without discovery.

30. On September 3 Defendants' Motion to Produce Documents was taken under submission after argument by counsel for Defendants and Contestant. Proper notice of this hearing had been duly given.

31. On September 10, the Court ordered Contestant to produce designated documents and a phonograph record of the voice of Decedent for inspection by Defendants at the office of Contestant's attorney on September 16 at 1:00 p.m. Such Order was signed, filed and served on Contestant's counsel's office on the same day.

On September 15 a Petition for a writ of prohibition was filed with the District Court of Appeal by Contestant to review the Order requiring the production of documents. This Petition was denied by the District Court of Appeal on September 16. Contestant filed such Petition to hinder and delay Defendants' efforts at discovery.

On September 16 Defendants' counsel appeared at the office of Contestant's attorney for the production of documents pursuant to the Order of September 10. Contestant failed then,

and continues to fail, to produce any of the specified documents or phonograph record. Contestant admitted in his December, 1963, deposition that the designated documents and such record were in existence and in his possession. Contestant has made no representation to the Court or to Defendants which, if any, of the documents he is unable to produce. Contestant has not offered any excuse to the Court or to Defendants for his refusal to produce such record and all or any of the documents, nor has he offered at any time to produce any of them.

Neither on September 16, the time set for production, nor subsequent thereto, has there been outstanding an order of this Court staying its Order to Produce Documents pending a decision in the District Court of Appeal or otherwise, or granting a protective order with reference thereto. Contestant's refusal to produce such record and all or any of the designated documents was willful and a part of the scheme or plan preconceived by Contestant and actively pursued by him with the intent of preventing Defendants from obtaining any discovery prior to trial or forcing Defendants to go to trial without discovery.

32. On September 10 notice of taking the deposition of Contestant on September 20 was served by Defendants upon both Contestant and his attorney. On September 20 the deposition of Contestant was convened at 9:30 a.m. The file does not reflect that written objections by Contestant to any alleged errors or irregularities in the notice of taking deposition of September 10 were ever served on Defendants. On September 20 there was no Order of the Court, either staying the deposition, or granting a Protective Order or in any other way preventing the taking thereof. Proper notice thereof was duly given. If there is any question whether Contestant had prope. .otice or had not been the subject of an Order under Code of Civil Procedure Section 2019(b)(2), such objections were waived by the physical presence of Contestant and his counsel at the proceeding without

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raising such objections, and by his failure to serve written objections under Code of Civil Procedure Section 2021.

On September 20 Contestant and his counsel were present but Contestant refused to answer any questions as to the merits of the case at such time.

Contestant's counsel refused to permit the taking of the deposition on the ground that it was suspended because he was going to file a Petition for Hearing of the denial of his Petition for Writ of Mandate by the District Court of Appeal with the Supreme Court that afternoon. After the deposition was adjourned Contestant did file such Petition for Hearing in the Supreme Court on that day. No stay order pending decision on the Petition for Hearing was issued by this Court or the California Supreme Court prior to the deposition or at any time. Contestant adopted this ground in order to prevent the deposition from commencing and proceeding and filed such Petition in an effort to hinder and delay Defendants' efforts at discovery. Such Petition was denied by the Supreme Court on October 7.

The acts of Contestant and his counsel at the deposition proceeding were a part of the scheme or plan which was preconceived by Contestant and actively pursued by him with the intent of preventing Defendants from obtaining any discovery prior to trial or forcing Defendants to go to trial without discovery.

33. The discovery attempted to be obtained from Contestant by Defendants by means of interrogatories, depositions and production of documents was reasonably necessary to the defense of the action.

34. Contestant refused and willfully refused to obey an Order of this Court that his deposition be taken on September 1.

35. Contestant willfully refused to answer any questions as to the merits of the case at his deposition on September 1.

36. Contestant willfully refused to answer any questions as to the merits of the case at his deposition on September 20.

37. Contestant willfully failed to serve and file any answers to interrogatories prior to the filing of the Motion to dismiss and willfully failed to file responsive answers thereto at any time.

38. Contestant refused and willfully refused to obey an Order of this Court compelling him to produce documents.

39. Contestant's failure properly to comply with the discovery sought from him deprived Defendants of a full and fair opportunity to prepare their defenses and would have deprived this Court of evidence indispensable to a proper adjudication of the issues.

The Court has made certain express Findings of Fact hereinabove. The making of such express Findings shall not be deemed to exclude or negate any additional implied findings justified by the record which would be necessary or proper to support the Order made herein. To the extent that any of the above findings may contain conclusions of law, such conclusions of law shall be deemed incorporated in the Conclusions of Law hereinafter made.

CONCLUSIONS OF LAW

1. Defendants were entitled to discovery from Contestant in defense of the Amended Will Contest after Probate.

2. All notices pertaining to any discovery matters or hearings in connection therewith were given as required by law or if not so given were waived by Contestant. All rulings in any hearings pertaining to discovery in the Contest after Probate which were required to be incorporated into attorney orders were signed promptly and served on Contestant's attorney within reasonable times prior to the hearings or matters to which they related.

3. Contestant refused willfully and otherwise to obey an Order of this Court fixing the date and time for the taking of his deposition. His Amended Will Contest after Probate should be

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dismissed on that ground pursuant to Code of Civil Procedure Section 2034(b)(2)(iii).

4. Contestant willfully failed to appear at his deposition on September 1 after proper notice thereof. His Amended Will Contest after Probate should be dismissed on that ground pursuant to Code of Civil Procedure Section 2034(d).

5. Contestant willfully failed to appear at his deposition on September 20 after proper notice thereof. His Amended Will Contest after Probate should be dismissed on that ground pursuant to Code of Civil Procedure Section 2034(d).

6. Contestant willfully failed to serve and file answers to properly served interrogatories submitted under Code of Civil Procedure Section 2030. His Amended Will Contest after Probate should be dismissed on that ground pursuant to Code of Civil Procedure Section 2034(d).

7. Contestant refused willfully and otherwise to obey an Order of this Court made under Section 2031 of the Code of Civil Procedure. His Amended Will Contest after Probate should be dismissed on that ground pursuant to Code of Civil Procedure Section 2034(b)(2)(iii).

8. The facts and the conclusions of law which relate to each basis of the Order of dismissal of Contestant's after Probate Will Contest are intended to be, and are separate and distinct, and not a cumulative basis for such dismissal.

9. The Court has made certain Conclustions of Law hereinabove. Should any additional Conclusions of Law, not expressly stated, be necessary to support the Order made hereinafter and be properly supported by the Findings of Fact hereinabove, such additional Conclusions of Law are hereby made and incorporated herein. To the extent that any of the preceding Conclusions of Law may contain Findings of Fact, such Findings shall be deemed incorporated

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in the Findings of Fact hereinabove.

NOW, THEREFORE, on each of the several and distinct grounds specified in the Findings of Fact and Conclusions of Law, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Amended Will Contest after Probate herein be, and it is hereby dismissed.

DATED: December 16, 1966.

Donald R. Wright

DONALD R. WRIGHT
Judge of the Superior Court

APPENDIX 3.

Declaration of Service of Motion to Dismiss Appeals.

State of California, County of Los Angeles—ss.

I am a citizen of the United States and a resident of the County aforesaid; I am over the age of eighteen years and am not a party to the within entitled action; my business address is 510 South Spring Street, Los Angeles, California 90013.

On April 24, 1967 I served the within Motion to Dismiss Appeals, together with supporting papers, on the Appellant in said action, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Ronald H. Bonaparte, Esq.
6331 Hollywood Boulevard
Suite 706
Hollywood, California 90028

Marcellus N. Joslyn
General Delivery
Pasadena, California

Marcellus N. Joslyn
324 Morningside Drive
San Antonio, Texas

I certify, under penalty of perjury, that the foregoing is true and correct.

Executed on April 24, 1967, at Los Angeles, California.

/s/ Mimi C. Brichaux
Mimi C. Brichaux

APPENDIX 4.

Appellate Rules Involved.

California Rules of Court, Rules on Appeal.

RULE 16. SERVICE AND FILING

(a) [*Time*] In civil cases appellant's opening brief shall be served and filed within 30 days after the filing of the record in the reviewing court; respondent's brief shall be served and filed within 30 days after filing of appellant's opening brief; and appellant's reply brief, if any, shall be served and filed within 20 days after filing of respondent's brief, except that when there is a cross-appeal pursuant to rule 3 appellant's reply brief which also contains his brief as cross-respondent shall be served and filed within 30 days after filing of respondent's brief containing his brief as cross-appellant, and respondent's reply brief as cross-appellant shall be served and filed within 20 days after filing of appellant's reply brief containing his brief as cross-respondent. By stipulation filed with the reviewing court the parties may extend each of such periods for not more than 60 days, and thereafter the time may be extended only by the Chief Justice or Presiding Justice, for good cause shown. No such stipulation shall be effective unless it is filed prior to the expiration of the period sought to be extended.

RULE 17. FAILURE TO FILE BRIEF

(a) [*Opening brief*] If the appellant's opening brief is not filed within the time prescribed in subdivision (a) of rule 16, the clerk of the reviewing court shall notify the parties by mail that if the brief is not filed within 30 days after the date of mailing of the notification, the appeal will be dismissed, unless good cause

is shown for relief. If a sufficient written showing of excuse is made within such 30-day period, the Chief Justice or Presiding Justice may grant additional time to file the brief subject to such conditions as he may deem proper to impose; otherwise the appeal may be dismissed forthwith.

If the brief is not filed within the time granted by the Chief Justice or Presiding Justice, the appeal may be dismissed forthwith. If the notification is not mailed by the clerk or the appeal is not dismissed on the court's own motion, the respondent may move to dismiss the appeal.

RULE 24. DECISION OF REVIEWING COURT

(a) [*When decisions become final*] All decisions of the reviewing courts shall be filed with the clerk who shall forthwith transmit a copy of the opinion to the lower court or tribunal and to the parties. A decision of the Supreme Court becomes final 30 days after filing unless prior to the expiration of said 30-day period either a shorter time, or an additional period of not to exceed 30 days, is ordered by the court. A decision of a Court of Appeal becomes final as to that court 30 days after filing, except that the decision becomes final as to that court immediately after filing upon the denial of a petition for a writ within its original jurisdiction without issuance of an alternative writ or order to show cause or the denial of a transfer to a Court of Appeal after certification in a case within the original jurisdiction of a municipal or justice court. When a decision of a Court of Appeal is final as to said court, it is not thereafter subject to modification by said court. Where an opinion is modified without change in the judgment, during the time allowed for rehearing, such

modification shall not postpone the time that the decision becomes final as above provided; but if the judgment is modified during that time, the period specified herein begins to run anew, as of the date of modification.

RULE 27. REHEARING IN COURT RENDERING DECISION

(a) [*Power to grant rehearing*] The Supreme Court or a Court of Appeal may grant a rehearing after its own decision in any cause except the denial by a Court of Appeal of a petition for a writ within its original jurisdiction without issuance of an alternative writ or order to show cause or the denial of a transfer to a Court of Appeal after certification in a case within the original jurisdiction of a municipal or justice court. A rehearing may be granted on petition, as provided in subdivision (b) of this rule, or on the court's own motion, prior to but not after the time the decision becomes final therein.

(b) [*Time for filing petition*] A party seeking a rehearing either in the Court of Appeal or in the Supreme Court, must serve and file a petition therefor within 15 days after the filing of the decision.

(c) [*Time for filing answer*] An answer may be served and filed within 23 days after the filing of the decision.

(d) [*Form of petition and answer*] Insofar as practicable, the petition and answer shall conform to the provisions of rule 15.

(e) [*Determination of petition*] An order of the Supreme Court granting a rehearing shall be signed by at least four judges assenting thereto, and filed with the

clerk. If no order is made before the decision becomes final as provided in subdivision (a) of rule 24, the petition shall be deemed denied, and the clerk shall enter a notation in the register to that effect.

RULE 28. HEARING IN SUPREME COURT

(a) [*Time within which court may grant hearing*] Within 30 days after a decision of a Court of Appeal becomes final as to that court, the Supreme Court, on its own motion, or on petition as provided in subdivision (b), may order the cause transferred to itself for hearing and decision, and within the original 30-day period the Supreme Court may for good cause extend the time not to exceed an additional 30 days.

(b) [*Time for filing petition*] A party seeking a hearing must serve and file a petition therefor within 10 days after the decision of the Court of Appeal becomes final as to that court, except that a petition may not be filed after denial of a transfer to a Court of Appeal after certification in a case within the original jurisdiction of a municipal or justice court. Proof shall be made of the delivery or mailing of three copies of a printed petition or a petition prepared by other process of duplication in lieu of printing or one copy of a typewritten petition to the clerk of the Court of Appeal which rendered the decision. When such copies are delivered to the clerk of the Court of Appeal, he shall forthwith transmit to the clerk of the Supreme Court the original record, briefs, and all original papers and exhibits on file in the cause. If the petition is denied, the clerk of the Supreme Court shall return them to the clerk of the proper Court of Appeal. If the petition is granted, they shall be retained and properly numbered by the clerk of the Supreme Court.

(e) [*Determination of petition*] A hearing in the Supreme Court, after decision in the Court of Appeal, may be granted by an order, signed by at least four judges assenting thereto, and filed with the clerk. The denial of a hearing may be evidenced by an order signed by the Chief Justice and filed with the clerk. If no order is made within the time specified in subdivision (a) of this rule, the petition for hearing shall be deemed denied and the clerk shall enter a notation in the register to that effect.

RULE 41. NOTICED MOTIONS IN THE REVIEWING COURT

(c) [*Failure to oppose motion*] Failure of an appellant to appear and oppose a motion to dismiss an appeal after due service of notice of motion, or to file a written opposition to the motion, may be deemed an abandonment of the appeal authorizing its dismissal. Failure of the adverse party to serve and file written opposition to any other motion may be deemed a consent to the granting of such motion.